Filed 2/5/03 In re Jesse G. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JESSE G., a Person Coming Under the Juvenile Court Law.	B159525 (Super. Ct. No. CK04729)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GERARDO C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Mildred Escobedo, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Sterling Honea, Principal Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Gerardo C., the father, appeals from an order terminating his parental rights to the child, Jesse G., pursuant to Welfare and Institutions Code[1] section 366.26. The father claims the juvenile court erred in finding the child, who has cognitive delays and behavioral problems, was adoptable and in failing to find an exception pursuant to section 366.26, subdivision (c)(1)(A). We reject these contentions and affirm the order under review.

II. BACKGROUND

On June 3, 1999, the Los Angles County Department of Children and Family Services (the department), filed a section 300 petition on behalf of the child, who was born in April 1998. In the detention report, the department reported that the child had been detained on June 1, 1999. Police officers detained the child when the father and the mother, Vicki G., were both arrested for domestic violence. (Pen. Code, § 243, subd. (e)(1).) The police report, which was attached to the detention report stated that, on June 1, 1999, the father and mother were staying at a motel with the child. The mother was pregnant. At about 6 a.m., the father and the mother had an argument about whose child she was carrying. According to the father: the mother became angry and started hitting him; she scratched him with her nails, which caused a one inch cut behind his left eye; the mother used drugs all the time; and she would fight with him after using the drugs. The mother denied hitting the father. She stated: that an unknown suspect came

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

to their room and hit the father; the father woke her up and started accusing her of being with other men; and the father then started to hit her with his fists. But the mother had no visible signs of injury.

The sustained petition alleged: that the child was periodically exposed to violent confrontations between the parents; this included the June 1, 1999, incident where they were both incarcerated after the father sustained the one-inch laceration over his left eye; as a result, the child's physical and emotional health and safety were at risk; the mother had a history of substance abuse; she had a history of criminal and drug arrests and convictions for drug related offenses; the problems remained unresolved, which rendered her incapable of providing regular care, protection, and support for the child; the child had four older half-siblings that were dependents of the court; the mother had failed to comply with previous court orders regarding the child's siblings and failed to reunify with the children; and her conduct endangered the child's physical and emotional health and safety and created a detrimental home environment. The department sought an order pursuant to section 361.5 that no reunification services be provided to the family.

On June 4, 1999, the court found the department established a prima facie case for detaining the child and a substantial danger existed to his physical or emotional health without removal from parental custody. The court ordered the child detained and placed in shelter care. The court ordered monitored visits by the parents.

In July 1999, the department reported for a pretrial resolution conference that: the mother admitted using drugs for about five to eight years; she smoked cocaine and used alcohol; four of the mother's older children had been removed from her custody and she had failed to reunite with them; one of the mother's older children had been taken from her custody because he was born with a positive toxicology screen for cocaine; a probation officer stated that the mother had been on probation from a conviction for a drug offense since April 20, 1999; the mother last tested for narcotics on April 24, 1999; and the mother had missed three tests since April 24, 1999. The father had known the

mother for about three years. However, he denied knowing she had an alcohol or drug problem. He also denied knowing about the mother's older children.

On July 15, 1999, the court sustained the section 300, subdivisions (a), (b), and (c) petition. The court found by clear and convincing evidence that a substantial danger existed to the child's physical health if he were not removed from parental custody. The court declared the child a dependent of the juvenile court and removed him from parental custody. Pursuant to section 361.5, subdivisions (b)(10) and (12), the court ordered that no reunification services be offered to the *mother*. The father was ordered to participate in a program including individual counseling to address anger management and domestic violence issues. The father was further ordered to participate in a parenting program.

For the six-month review hearing pursuant to section 366.21, subdivision (e), the department reported that: the child was in the foster home of Joyce H.; the father visited when his work schedule permitted; the father enrolled in domestic violence classes; but the father had not enrolled in a parenting class. The mother gave birth to another child, Danielle G., in November 1999. But the mother would not give the department an address where she could be contacted. (Neither the mother nor Danielle G., both of whom later disappeared, are parties to this appeal.) The department report stated: "[The] father does not doubt that this child is his. . . . [He] feels that his new-born daughter is not in danger nor at risk being with mother." The child was happy and playful but experienced temper tantrums. On January 13, 2000, the court set the section 366.21, subdivision (e) hearing and allowed the parties to contest the issue of reasonable services for the father and family reunification services. The court ordered preparation of a supplemental social worker's report to address: the father's participation and progress with ordered services; communications between the father and the social worker; and possible liberalization of the father's visits with the child. The court also ordered a development assessment for the child.

On March 13, 2000, the department reported that: the child was still living with Joyce H.; the child, who was almost two years old, was happy and social but unable to

make statements due to speech delays; the mother had disappeared with the newborn child, Danielle, in February; and the father wanted custody of the child but was not fully compliant with the court's orders. The father had attended domestic violence classes. But the father had not requested parenting classes. The social worker had given the father two referrals for free parenting classes. The father attended a parenting class at two different locations in March 2000. The Walden Family Services treatment team review stated in a quarterly report that the child's only problem was an inability to control his tantrums when he did not get his way. The foster mother was dedicated to the child who had a difficult time separating from the biological mother. On March 28, 2000, the court ordered the department to provide reunification services to the father.

On May 11, 2000, the department reported that the All Care Agency had assessed the child pursuant to the January 13, 2000, order for a development assessment. The agency recommended an examination be conducted by a pediatric neurologist and a referral to the Regional Center for further evaluation and possible treatment. The child was referred to the Regional Center but that assessment had not yet been completed. The father was attending domestic violence and parenting classes. The father was renting a room in a house that was extremely chaotic. There was junk and garbage piled high and scattered throughout the house and yard. The house was unsafe, unsanitary, and unhealthy without "a single spot that is passable, that would not be hazardous for anyone, especially for a child." The department recommended unmonitored visits with the father but not at his residence.

On May 11, 2000, the court ordered unmonitored visits with the father but not at his residence. The child was ordered to have a neurological examination. The court found that: reasonable efforts had been made to reunite the child with the parents; the placement of the child was necessary and appropriate; and reasonable services had been provided to meet the needs of the child. The matter was continued to July 12, 2000, for a contested hearing.

On July 5, 2000, the department reported the father continued to reside in a place where "no human being should live" and the child could not be placed without risk to health and physical well-being. The court ordered the father to have unmonitored visits. The father chose to continue one-hour weekly visits with the child. The social worker recommended the father be ordered to complete the domestic violence classes. It was also recommended that the child remain with foster mother, Joyce, where he seemed to have all his needs met and there was a warm and tender relationship.

On July 12, 2000, after conducting a section 366.21, subdivision (f) hearing, the court found that continued jurisdiction was necessary and returning the child to the parents would create a substantial risk of detriment to the child. The court further found that: reasonable efforts to reunite the child and the parents had been made; the father had substantially complied with the case plan; the placement plan and detention of the child was necessary and appropriate; and reasonable services had been provided to meet the child's needs. The court ordered the department to continue to provide the father with reunification services until December 1, 2000. The court ordered the child be referred to an early intervention program and speech therapy. The court also ordered the father to cooperate with the department in having a Regional Center assessment or an Evidence Code section 730 evaluation. These studies were to address the father's ability to care for the child.

On August 23, 2000, the department reported the father had rented an apartment. The father reportedly rented the apartment in order to provide a residence for the child. The apartment was on the second floor with stairs immediately outside the door. The social worker was concerned about whether the father appreciated the safety risk of having an infant live on the second floor without protective gates. The department's report related, "[F]ather said that his Landlord, Felix Valiente, and landlord's wife will care for the child during father's absence." Later, Mr. Valiente and his family refused to undergo a mandatory background computer check. This was because Mr. Valiente claimed he was unsure how much he and his family would be paid for providing

babysitting. Mr. Valiente had previously indicated he and his family would undergo a criminal background check. The father was advised that it was his obligation to provide child care but that an application could be made for day care funding.

After the May 2000 hearing, the father began unmonitored visitation with the child. The father had initially stated that he wanted the visits from 8 a.m. to 5 p.m. The father did not understand that this meant that the visitation would last for nine hours. The father then indicated that he did not want the visit to last nine hours. It was agreed that the father would visit for three hours. He subsequently indicated that he wanted to visit for six hours. The father was given diapers for the child. But the father returned the child without having changed the youngster's diapers. The father did not understand that he needed to change the diapers to prevent discomfort or rashes. A social worker reported: the father and the child, who had a very good relationship, were happy to see one another; the father loved the child; but the father lacked knowledge of issues concerning safety, hygiene, and his financial obligations; and the father did not understand that parental duties consist of more than playing with the child during visits.

An 18-month permanency review was scheduled for December 1, 2000. For that hearing, the department reported: the father had weekly six-hour visits with the child; the father provided a safe and nurturing environment to the child during the six-hour visits; and the father and child were bonded and enjoyed each other. The social worker remained concerned, however, that the father could not arrange and care for the child while at work and the like. The father could not come up with any plan for the child's care. The family violence program provider sent a report dated November 30, 2000, to the department concerning the father. The report stated that father's participation was "unsatisfactory." The social worker felt the report was too harsh based on the father's limited capacities. However, the social worker wrote, "Yet, father's functioning in this class might be an insight as to why father has not made any movement towards establishing a plan for the minor's care, if and when he would receive custody of the child." The father did not keep the appointment for the Evidence Code section 730

evaluation. The purpose of the evaluation was to determine the father's capacity to safely care for the child. The father indicated on December 1, 2000, arrangements had been made with a woman to care for the child. The foster mother, Joyce, indicated that she would not be willing to adopt the child but was only interested in long term foster care. The child began an early intervention and speech program in July 2000. The director of the program recommended the child attend the program three times a week, without interruption. The social worker recommended long term foster care for the child. A counselor at the Exceptional Children's Foundation reported that the child exhibited some behavioral problems, including screaming, aggression, and a short attention span. The child, who was about 29 months, was developmentally about 19.8 months, which placed him roughly 10 months behind his chronological age.

The December 1, 2000, hearing was continued to January 12, 2001, for the father's Evidence Code section 730 evaluation. For the January 12, 2001, hearing, the department reported that the father was angry with the agency that was providing domestic violence counseling. He was involved in a dispute over funds that the agency claimed he owed. The father called another agency but did not want to pay the $20 intake session fee. The father was advised that he needed to: complete domestic violence classes; submit to the Evidence Code section 730 evaluation; and have a workable plan for caring for the child. The social worker gave the father referrals to other agencies for domestic violence counseling. The social worker stated that the father had ample time to finish the domestic violence classes and to plan for the child's care. But the father had not completed these tasks. Because the child needed permanency, the social worker recommended adoption as the permanent plan. The court-appointed counselor cancelled the appointment to evaluate the father.

On February 5, 2001, the social worker informed the court that the father had been advised by agencies that the child had problems that needed help and special attention. The father was adamant that the child had no special needs. A department memorandum

noted, "Then father began talking about how the Blacks ('Los Negros') were trying to make money by keeping [the child] from him." The foster mother, Joyce, was black.

On February 5, 2001, the court conducted the contested section 366.22 hearing and terminated reunification services. The court identified adoption as the permanent plan. The matter was set for a section 366.26 hearing in June 2001.

For the June 2001 hearing on May 15, 2001, the department reported the child was approved for an Individualized Education Program in April 2001 by the Los Angeles Unified School District. The district's evaluation team identified the child as eligible for services because of his mental retardation. However, because of the father's insistence that the child needed no professional help, the evaluation team opted for a developmental delay diagnosis. The father was encouraged to attend the child's programs but never did so.

The father called the "Board of Supervisors" to complain that his case was not being presented fairly to the court because of the language barrier. The father also said that he wanted another medical evaluation. The father wanted another examination because of the "false" allegation that child had mental problems. The father attended an April 2001 Individualized Education Program team meeting for the child. Six professionals and an interpreter for the father attended the meeting. The father maintained that the child was "normal" and did not need any special services or programs. One of the team members was concerned that the father's attitude would place the child at risk. There was a concern that the father might terminate the individualized education program.

The father began overnight visitation with the child in February 2001 which went well. The child was happy to see the father when the visits began. The child usually came back well dressed and rested. In April, however, the foster mother indicated the child returned from a visit wearing the same clothes he had on when he left. The child also had paint in his hair. The father was employed as a painter. The child was emotionally bonded with the father but did not understand that the youngster had special

needs. The father wanted the child placed in a Spanish speaking home. The social worker felt that the child should be in a Spanish speaking home. However, the child had bonded to the foster home and the social worker did not think the youngster should be removed from the residence where he had lived since June 1999.

On June 4, 2001, the department informed the court that the child had been removed from the foster home due to complaints about the quality and level of care he was receiving. The child was placed with a prospective adoptive Hispanic family. The court ordered that the father have unmonitored day visits only with the child and no overnight visitation. The matter was continued to July 2001.

On July 12, 2001, the department reported that the social worker attended a planning meeting concerning the child's individualized education plan on June 14, 2001. The purpose of the meeting was to amend the child's individualized education plan to a placement in a special education center rather than an ordinary public school. A member of the team expressed concern about the father's grasp of the child's needs, indicating, "[I]t was not just a situation of the language." The current foster parents had decided not to adopt the child. The child was having temper tantrums that were difficult to control. He refused to go to bed and to sleep. He would get up and walk around while everyone else was in bed. The adoption unit expressed a strong desire that the child not have visits with the father. On July 17, 2001, the court ordered that the father would have two to three hours unmonitored day visits with the child. The matter was continued to October 16, 2001.

On August 21, 2001, in a status review report, the department reported that child was still living in the foster home where he had been placed in since May 25, 2001. The child had all his needs met in the home and was bonded to the foster parents. The child was healthy but developmentally delayed and considered eligible for mental retardation services. The couple did not want to adopt the child. One couple who had expressed an interest in adopting the child decided not to proceed with the proposed adoption. A pre-placement conference with another couple was held on August 17, 2001.

The father spent one-half hour with the child at the special education center. The program specialist stated that "the father was good with" the child. The father completed domestic violence and parenting classes. The father was in individual therapy but he showed difficulty in understanding what was being said to him. The father indicated that he had a severe hearing loss. But the father did not wear a hearing aid. The father expressed a willingness to cooperate with the child's special needs. The social worker never had any indication that the father was unable to hear. But the social worker had many experiences where the father had problems understanding what was being said.

The social worker indicated that there was a warm and affectionate connection between the father and child. However, the father consistently denied the child had special needs. This made it doubtful the father would provide for all the child's needs. The department continued to recommend adoption as the permanent plan.

On September 5, 2001, the department related the contents of an August 28, 2001, report from Dr. Sandi J. Fischer, a University of California at Los Angeles psychologist. Dr. Fischer concluded the child had significant delayed skill in both cognitive and motor areas. Dr. Fischer reported: "The Department of Children and Family Services will need to find a family for the [child] who fully understands his cognitive and motor limitations and the likelihood that he will have special needs throughout his lifetime. [This] is a child who will require parents who can make a commitment to taking him to special appointments (e.g. speech therapy, physical therapy), can spend special time helping him to learn, and will rejoice with him as he makes slow progress." After speaking with the team supervised by Dr. Fischer who tested the child, the prospective adoptive parents withdrew their names from consideration to adopt him. No prospective parents were identified that wanted to adopt the child.

On October 4, 2001, the department reported that the child had increased his habit of waking up early, such as 3 a.m., and shouting and crying for long periods of time. This behavior stopped around October 1, 2001. The child had gained weight and appeared very healthy and had become much more affectionate. The special education

center indicated that: the child had a short attention span but was adjusting to the program; he needed adult assistance while sitting in a circle or working at the table; and he was gradually showing improvement in all areas. The social worker had been notified by the Regional Center that the child qualified for further services. The child had many needs for professional care and services for his growth and development. The social worker doubted that the father understood the needs and would be able to provide for them.

The father began individual therapy in May 2001 but terminated it at the end of August 2001. The therapist stated the father had difficulty with therapy and was not benefiting from it. It was noted that the father had a negative attitude and complained about social services. The father's refusal to do a hearing evaluation also made it difficult to counsel him. On October 1, 2001, the father indicated that he enrolled in individual counseling at the California Family Counseling Center. However, the center would not confirm or deny the father's enrollment.

On November 19, 2001, the department reported that the child continued to cause serious problems for the foster family. The child disturbed the family by waking up in early hours of the morning, at around 2 a.m., waking the entire house screaming and yelling. The child would get out of bed and roam around the house. The child was extremely hyperactive during the day. A third prospective adoptive couple expressed some interest in adopting the child. The department was attempting to have the child's hearing evaluated as recommended in the developmental assessment for adoption. However, one pediatrician refused to perform the recommended evaluation because the child did not appear to have a hearing loss. Three other providers refused to perform the recommended test.

The father and the child had good visits. There was much affection between the two of them. The foster parents wished the visits with the father were longer so that they can have a respite from the child's needs. The father presented a slip from a clinic indicating that he suffered from a "long standing" ear disease with Bilateral hearing loss.

The social worker indicated that the father appeared to hear clearly when they visited. The social worker was concerned about the father's ability to meet the child's many physical and mental needs. The social worker doubted that the father even had the ability to meet the child's basic needs. Adoption continued to be identified as the best permanent plan for the child.

On February 7, 2002, the department reported that the child had been removed from his foster home because he was causing too many problems. On December 26, 2001, the child was placed with the foster mother, Melodina O., who lived in Little Rock, California. This was the only foster home available. The child had not experienced any of his prior behavioral problems in the new home. He was the only child in the home for about a month. A five-year-old was placed in the home and the child adapted quickly to the other youngster. The foster mother was in the process of attempting to potty train the child. Up until this time, there was no indication that he was capable of being potty trained.

The father has improved his record in being compliant in individual therapy. The therapist was pleased with the father's participation. The father loved the child but was unwilling to permit the child to be cared for by those who will give him everything he needs. The father stated that if he obtained legal custody of the child he will do whatever is necessary for the child's well being. The father had difficulty visiting the child in Little Rock, California. The father only visited the child once in January. An appointment was arranged for February 5, 2002, but the father missed the visit.

Although the child was a special needs youngster, he was considered highly adoptable as of December 2001 by the adoptions recruitment coordinator. Adoption remained the recommended plan. Plans were made to place the child on television to obtain adoptive parents on March 13, 2002.

The court was subsequently advised that, the foster mother, Melodina, had requested that she be allowed to adopt the child. An adoption assessment had been completed. The foster mother knew the child's history. The child had ceased some of

his difficult behavior since being placed in her home. The foster mother had become very attached to the child and wanted to provide him with a permanent adoptive home.

The court was also informed that, on February 20, 2002, a referral was received with allegations that the child was sexually abused by the father. The father visited with the child on February 8, 2002. After the father's visit, the foster mother noticed that the child's penis was red. On February 20, 2002, the child was holding his genital area. The child stated, "[D]addy hurt my peepee with his finger." The child made the same allegation to a sheriff's detective and two social workers. The detective indicated that the referral needed to be made within 72 hours of the incident and that two weeks was too late to do anything. According to the foster mother, the child continually held his genital area. The department reported the father's explanation as follows: "He visited with the child on [August 8, 2002]. He stayed around the Metrolink station. He changed the [child's] diaper but nothing happened. He denied anything except cleaning the child." On March 1, 2002, the court ordered that the father's visits with the child were to be monitored until the next court hearing. The matter was continued to April 22, 2002, for the contested section 366.26 hearing.

On April 19, 2002, the department reported that the child remained with the foster mother, Melodina, where he had been for four months. The child adapted well to his new home. The home study for the foster mother had begun but would not be completed until June. The child had an affectionate bonding with the foster mother, who understood the youngster's needs. No response was received from two Fox television news segment which spotlighted the child for adoption. The foster mother had been able to potty train the child at home. The child's special education teacher at the Alpine Elementary School in Pearblossom stated that: the child was doing outstanding; the staff was having no problems with him; the child had no "time outs"; and although he was not potty trained, he informed the staff when he needed to be changed and ran to the changing table.

The father had weekly monitored visits with the child. The father missed several visits because he did not make appointments with the foster mother. The father insisted

that he was able to provide for the child's needs. The father refused to consider adoption as a way to meet the child's needs. Dr. Marcia Ware, a child abuse examiner, concluded that there was "nothing diagnostic of Sexual Abuse." The child had an infection that could have been caused by bubble bath which the foster mother had used. Dr. Ware stated that it was her "gut feeling" that there was no sexual abuse.

On April 22, 2002, the court began the section 366.26 hearing. The court received a number of reports into evidence. The foster mother testified she knew that the child had special needs. The child had neither cried out nor yelled in the middle of the night since he was in her care. The child would have tantrums sometimes. The foster mother wanted to adopt him because she loved him. They got along fine with each other and in her opinion, the child was a good kid. She did not want to stop the contact between the child and the father if it made the youngster happy.

The social worker, Robert Spader, testified that the child had special needs. Mr. Spader had observed the child show affection to the father. Mr. Spader had no doubt that the father and child loved one another and there were no negative feelings between the two. The nature or the feelings between the child and the foster mother and the father was described by Mr. Spader as follows: "[W]hen I would be with the foster mother, he would -- the child would say I want to go home, meaning the father. When I was with the child [and] with the father, he would tell me I want to go home with the foster mother." The child bonded with both the foster mother and the father. Mr. Spader believed the child was adoptable given the bond with the foster mother. The child had complete confidence in the foster mother. Mr. Spader described the interaction between the child and the foster mother at length. They have a loving interaction. Mr. Spader was concerned about the child's ability to form attachments.

The father testified. The father said he did not want the child to be adopted. Before the child was moved to Little Rock, the father visited the youngster every Monday for about four months at the special education school. The father stayed for about two hours until the class was over.

After counsel argued, the juvenile court found by clear and convincing evidence that the child was adoptable. The court also found that the father did not meet his burden of establishing an exception under section 366.26, subdivision (c)(1)(A). The court did not terminate parental rights but continued the matter to June 17, 2002, for receipt of the child's birth certificate and for home study documents of the foster mother.

On June 13, 2002, the department reported that the home study was being conducted by a private adoption agency. The foster mother needed to provide additional documents. On June 17, 2002, the juvenile court found that it would be detrimental to the child to be returned to his parents. The court terminated parental rights. The father filed a timely notice of appeal.

III. DISCUSSION

A. Adoptability

The father challenges the sufficiency of the evidence to support the juvenile court's finding that the child was adoptable. The department claims the father has waived this claim by failing to object on this ground in the juvenile court. However, it has been held, "[A] claim that there was insufficient evidence of the child's adoptability at a contested hearing is not waived by failure to argue the issue in the juvenile court." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623; accord, *In re Erik P.* (2002) 104 Cal.App.4th 395, 399.) Accordingly, although the father did not object to the finding of adoptability at the hearing, he may raise his insufficiency of the evidence claim. The juvenile court may only terminate parental rights based on clear and convincing evidence of the likelihood the child will be adopted within a reasonable time. (§ 366.26, subd. (c)(1); *In re Erik P.*, *supra*, 104 Cal.Ap.4th at p. 400; *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223; *In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.) The adoptability issue was described by the Court of Appeal as follows: "'The issue of

adoptability . . . focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]' (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)" (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, italics in original.) We review the testimony and reports relied upon by the trial court for substantial evidence. (*In re Jeremy S., supra,* 89 Cal.App.4th at p. 523; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

The father contends that the evidence establishes that the child's behavioral problems and mental retardation rendered the youngster unadoptable. The father cites the numerous times the child was moved from foster placement to support this contention. While there is certainly a history of difficulty in placing the child, there was substantial evidence adoption was likely to occur within a reasonable time. At the section 366.26 hearing, the foster mother testified that she loved the child. The problems the child had experienced in the other foster homes had not been exhibited in her residence. The foster mother also recognized the child's special needs and had made progress in addressing some of those questions including potty training the child. Out of an abundance of caution, the juvenile court decided to continue the section 366.26 in part to evaluate whether the relationship between the prospective adoptive mother and the child was in a "honeymoon" phase. The fact that the child has found a prospective parent willing to adopt him is sufficient evidence that there is a likelihood that he will be adopted. (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Aside from his new prospective adoptive home, the child had also been identified by the adoption unit as highly adoptable. Under the circumstances, there was substantial evidence to support the determination that the child was adoptable.

B. The Beneficial Relationship Exception

The father contends that juvenile court erred in terminating his parental rights because he established a beneficial relationship exception under section 366.36,

subdivision (c)(1)(A) which provides in part: "If the court determines, based on the assessment provided . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . A finding . . . that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) At a section 366.26 hearing, the trial court is required to select and implement a permanent plan for the dependent child. If the child is likely to be adopted, adoption is the preferred permanent plan. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; *In re Edward R.* (1993) 12 Cal.App.4th 116, 122; *In re Heather B.* (1992) 9 Cal.App.4th 535, 546.) As the Court of Appeal explained in the case of *In re Tabatha G.*, *supra*, 45 Cal.App.4th at page 1164: "In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) The parent then has the burden to show termination [of parental rights] would be detrimental to the minor under one of four specified exceptions. (§ 366.26, subd. (c)(1)(A)[-](D).) In the absence of evidence termination [of parental rights] would be detrimental to the minor under one of these exceptions, the court '*shall* terminate parental rights . . . .' (§ 366.26, subd. (c)(1), italics added; [citation].)" (Italics in original.) Under section 366.26, subdivision (c)(1)(A), a parent must show that he or she "ha[s] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The burden is on the parent to prove that termination of parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827; *In re*

Lorenzo C. (1997) 54 Cal.App.4th 1330, 1343-1345; *In re Tabatha G.*, *supra*, 45 Cal.App.4th at p. 1164.)

In the decision of *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, the Court of Appeal for the Fourth Appellate District, Division One, addressed the section 366.26, subdivision (c)(1)(A) exception as follows: "In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [¶] . . . The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id*. at pp. 575-576; accord, e.g., *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424- 425; *In re Lukas B.*, *supra,* 79 Cal.App.4th at pp. 1155-1156; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1344-1345, 1347, 1349; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 853; *In re Andrea R.*, *supra*, 75 Cal.App.4th at p.

1109; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822; *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342; *In re Jason E.* (1997) 53 Cal.App.4th 1540, 1548; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.)

Other courts have expanded on the *Autumn H.* standard. The Court of Appeal in the decision of *In re Beatrice M.*, *supra*, 29 Cal.App.4th at page 1418, summarized as follows: "Although the kind of parent/child relationship which must exist in order to trigger the application of section 366.26, subdivision (c)(1)(A) is not defined in the statute, it must be sufficiently strong that the child would suffer detriment from its termination." The *Beatrice M.* court concluded that "frequent and loving contact" was not sufficient to establish the exception applied. The court noted: "No matter how loving and frequent their contact with the girls, [the parents] had not occupied a parental role in relation to them at any time during their lives." (*Id*. at pp. 1418-1419; see also *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349 [the court is to provide "'a compelling reason for determining that termination would be detrimental to the child'" which requires parent to demonstrate some benefit from a continued relationship]; *In re Brittany C.*, *supra*, 76 Cal.App.4th at p. 854 [parents must show at least one biological parent occupies a parental role rather than a friendship]; *In re Andrea R.*, *supra*, 75 Cal.App.4th at pp. 1108-1109 [parents are required to establish more than "'frequent and loving contact'" or an "emotional bond" accompanied by pleasant visits but must show "parental role"]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [there is legislative preference for adoption which should be ordered unless exceptional circumstances are established by showing "the existence of such a strong and beneficial parent-child relationship" which "outweighs the child's need for a stable and permanent home"]; *In re Amanda D.*, *supra*, 55 Cal.App.4th at p. 821 [beneficial test requires parent to show "a parental role to the minors" and "strength and quality of the biological relationship outweighs the security and sense of belonging a new family would confer"]; *In re*

Jason E., *supra*, 53 Cal.App.4th at p. 1548 [exception applies by showing the existence of "'a significant, positive, emotional attachment from child to parent' and that relationship of the parent to the minor is one of parent and child rather than one of being a friendly visitor or friendly nonparent relative such as an uncle"].)

There is disagreement among the appellate courts as to the appropriate standard of review for the trial judge's finding. The Supreme Court has stated that custody determinations are reviewed for abuse of discretion. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) The Court of Appeal in the decision of *In re Jasmine D.*, *supra*, 78 Cal.App.4th at page 1351 concluded that the abuse of discretion standard applies to determinations of whether placement of child for adoption would be detrimental. (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 774 ["the trial court did not err"]; *In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1156 ["the trial court did not err"]; *In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1109 ["[The parents] fail[ed] to establish that the trial court erred or abused its discretion . . ."].) The Supreme Court explained in *Stephanie M.*: "[W]hen a court has made a custody determination in a dependency proceeding, '"a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."' [Citations.] . . . '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

As noted by *Jasmine D.*, however, there are several appellate courts which have concluded that the determination is subject to review under the substantial evidence standard. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351; *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576; see *In re Cliffton B.*, *supra*, 81 Cal.App.4th at pp. 424-425; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827; *In re Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1532, 1533; *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563; *In re*

Teneka W., *supra*, 37 Cal.App.4th at p. 729.) As the Court of Appeal explained in the case of *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 576: "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" Similarly, in the decision of *In re Casey D.*, *supra*, 70 Cal.App.4th at pages 52-53, the Court of Appeal held: "It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citations.] Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. [Citation.]" We cannot reweigh the evidence and substitute our judgment for that of the trial court. (*Id*. at p. 53.) In any event, as *Jasmine D.* noted: "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, nor judge could reasonably have made the order that he did.'"' [Citations.]" (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351, citing *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

In this case, under either standard of review, the trial court's finding must be upheld. Application of the factors used in determining whether a relationship is important and beneficial establishes the court did not err in concluding that the child's need for a permanent, stable adoptive home outweighed a continued relationship with the father. The factors include: the age of the child; the portion of the child's life spent in the parent's custody; the positive and negative interaction between the parent and the child;

and the child's particular needs. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

In this case, the child, who was born in April 1998, had been in foster care since June 1, 1999. The section 366.26 hearing was concluded in July 2002 over three years after the child had been originally detained. The child had been in several foster homes during that three-year period. The child had a number of special needs and behavioral problems which needed to be addressed. The child had been evaluated as developmentally delayed with eligibility for mental retardation services. The father refused to acknowledge that the child had special needs. The father's refusal to acknowledge the child's special needs lasted throughout most of the proceedings. For example, when the child was participating in a special education program, the social worker encouraged the father to attend the youngster's classes. The father consistently refused to do so. The father ultimately attended one class. The father also refused to cooperate in the individualized education program evaluation which was designed to obtain the appropriate plan for the youngster's special needs. At least two different professionals expressed reservations about allowing the father to have custody of the child. The recommendations were made because the father refused to acknowledge that the child had special needs. In December 2001, the child was placed in his current foster home. The foster mother wanted to adopt the child. The foster parent was aware of the child's special needs. The foster mother was ready, willing, and able to take him to his numerous appointments. In addition, since the child had been placed with the foster mother, he had made numerous positive changes including becoming partly potty trained. Before being placed with the foster mother, it was believed that the child could not be potty trained. The child also had not demonstrated a number of the behavioral issues he had exhibited in other foster homes. He was no longer crying out in the middle of the night. He was also doing outstanding in his special education class. It cannot be disputed that there was a loving relationship between the father and the son. However, the relationship did not outweigh the child's right to have a permanent, stable, and loving

environment where his particular needs would be met. This child, who was four years old at the time of the hearing, had been in foster care for most of his life. Considering his age, his special needs and those of any youngster to a permanent and stable life, we conclude that the juvenile court could properly determine that the child should be freed for adoption and that parental rights should be terminated.

IV. DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

MOSK, J.